No. 25-802

IN THE
Supreme Court of the United States

FOOTHILLS CHRISTIAN MINISTRIES, ET AL.,

Petitioners,

v.

KIM JOHNSON, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES D/B/A NIFLA IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes, Rules and Regulations

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The National Institute of Family and Life Advocates ("NIFLA") is a nonprofit organization that provides education, training, and legal counsel to pregnancy centers, empowering mothers to choose life for their unborn children. NIFLA represents more than 1,800 pro-life pregnancy centers nationwide—most of which operate as licensed medical clinics—and offers healthcare instruction and legal guidance to protect and defend those centers.

NIFLA has been at the forefront of opposing government-compelled speech since its journey to this Court in *National Institute of Family & Life Advocates* v. *Becerra,* 585 U.S. 755 (2018). There, California had forced private organizations, including NIFLA members, to promote messages contradicting their organizational values. Since then, NIFLA has defended against other discriminatory speech mandates in Illinois, Minnesota, New York, Vermont, and California.

As an organization that now represents over 140 member centers in California alone, NIFLA has a strong interest in ensuring that its victory in *Becerra* is regarded by lower courts. If the Ninth Circuit's decision below stands, NIFLA fears regression of its First Amendment rights that could allow the State to compel speech contrary to NIFLA's pro-life and religious beliefs.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus* and its counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties have received the timely notice required under Rule 37.2.

SUMMARY OF THE ARGUMENT

In 2015, California compelled NIFLA members and other pro-life organizations to adopt pro-abortion messaging in their pregnancy centers. Resisting this compulsion, NIFLA sued. The result was an unequivocal proclamation by this Court that the First Amendment forbids the government from co-opting speakers to advance messages they disagree with. *Becerra*, 585 U.S. 755.

Undeterred, California now oversteps the First Amendment again by compelling parochial preschools to publish and disseminate "a government-drafted script" that contradicts their religious values. *Id.* at 766. And again, California contravenes this Court's First Amendment jurisprudence.

California's law requiring childcare facilities to "inform each child[]... of the right[]... to be free to attend religious services or activities of his/her choice"—through signage and disseminated forms, see 22 C.C.R. § 101223(a)(5) ("Compelled Notice" or "Notice")—means that petitioners must obfuscate their Christian values in order to operate church preschools. Because the panel below upheld the Compelled Notice, considering *Becerra* inapplicable, petitioners must ask a question this Court has already all but answered: "Does California's religious services provision, requiring the posting of signage and handing out of written copies to parents, compel speech in violation of the First Amendment?" Pet. at i–ii. *Becerra* says the answer is "yes."

The decision below makes several logical blunders. The Ninth Circuit misunderstood the concept of "commercial speech," leading it to incorrectly conclude that *Zauderer* v. *Office of Disciplinary Counsel*, 471

U.S. 626 (1985), applies. The boundaries between commercial and non-commercial speech have been inconsistently drawn across circuits and state high courts—and problematically applied to religious and political nonprofits that conduct business-like activities. But this Court has repeatedly held that compelled ideological speech is anathema to the First Amendment. The Court should clarify the distinction between commercial and non-commercial speech, and reverse the Ninth Circuit because *Zauderer* does not apply to petitioners' ideological expression.

Even if *Zauderer* applies, the Ninth Circuit misapplied it. The Compelled Notice is neither purely factual nor uncontroversial. California has disavowed enforcement of the contents of the required notice, so the Compelled Notice is false, not factual. And the Compelled Notice is controversial, forcing church preschools to promote other faiths. As both controversial and not purely factual speech, it is prohibited even under *Zauderer*.

Regardless, the Compelled Notice also fails *Zauderer* as unjustified and unduly burdensome. It seeks to address a purely hypothetical problem. No evidence suggests that parents are confused about their children's rights; and if they were, the Compelled Notice would not help, because the State concedes it will not enforce those rights. Due to the speculative nature of the problem the Compelled Notice attempts to solve and the State's unwillingness to enforce the terms disclosed, the Compelled Notice is not justified and unduly burdens petitioners' speech.

Because the speech is not commercial, a different precedent governs: *NIFLA* v. *Becerra*. Several years ago, California required pro-life pregnancy centers to

disclose information about free and low-cost abortions. Now, California defends an almost identical law requiring notices that contradict other organizations' ideals. But in *Becerra*, this Court reaffirmed that compelled speech outside of the commercial context is governed by strict scrutiny and demands a compelling government interest in mandating speech, done in a narrowly tailored way. This Court struck down the law in *Becerra* as an unconstitutional use of state power, and the similarities warrant the same result here.

The Compelled Notice is not narrowly tailored to the general interest of protecting children's rights. California offers no evidence of attempting less restrictive means, let alone that those methods would not be sufficient for the purpose. The speech mandate is overbroad because it informs citizens of nonexistent rights. It's also underinclusive, offering exemptions to various secular organizations while requiring compliance from religious ones.

Evading this Court's decision from less than ten years ago, California continues to improperly compel speech in violation of the First Amendment. The Ninth Circuit's decision departs from existing precedent and, if allowed to stand, threatens the free-speech rights of religious organizations anytime they require a state license to operate. Given the substantial confusion among lower courts regarding when and how *Zauderer* applies, this Court should clarify and affirm First Amendment rights against compelled speech that infringes on faith-based organizations' values, by granting the petition and summarily reversing.

ARGUMENT

I. Petitioners' speech is not commercial, and the Ninth Circuit misunderstood and incorrectly extended *Zauderer*.

The Ninth Circuit deepens a circuit split by extending *Zauderer*, 471 U.S. 626, beyond preventing deceptive communications in commercial speech. The panel instead read *Zauderer* to compel private actors *not* engaged in commercial speech to sponsor a contradictory message.

This error flows from determining—without analysis—that petitioners' desire to operate a licensed preschool constitutes participation in "commercial speech," which (sometimes)[2] receives less protection. But this Court's First Amendment jurisprudence shows that this case should not have been reviewed under *Zauderer,* where a voluntary speaker solicits or proposes a commercial transaction, but instead under

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[2] See *Becerra*, 585 U.S. at 768 ("This Court has afforded *less protection* for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their "*commercial speech*." . . . Second, under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech." (citing *Zauderer*, 471 U.S. at 651 (cleaned up & emphases added))). There are, however, doubts as to the propriety of the Commercial Speech Doctrine altogether. See Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627 (1990) (stating "[t]he Supreme Court plucked the commercial speech doctrine out of thin air" and noting that the justifications for the doctrine also apply to other forms of speech—*i.e.*, reporting, novels, scientific journals, etc.—yet "we would be shocked at the suggestion that [they] are therefore entitled to a lesser degree of protection").

Becerra, where private, silent actors were forced to parrot the government's message.

a. The Ninth Circuit, without analysis, assumed the Compelled Notice was "commercial speech," contrary to *Becerra*.

There is no debate that Foothills Christian Ministries ("Foothills") is being compelled to communicate a message it disagrees with, and the compulsion is subject to First Amendment scrutiny. See Pet. App. 15a (California "requires Foothills to inform parents that a child is to be free to attend religious services or activities of [their] choice" and "Foothills does not want to communicate this message"); see also *ibid.* ("[T]he required posting of government-drafted notices can raise First Amendment issues" (citing *Becerra*, 585 U.S at 766)). The Ninth Circuit correctly identified the Compelled Notice as content-based, compelled speech. See *Becerra*, 585 U.S. at 766.

But the Ninth Circuit deviated from this Court's precedent when it jumped to a commercial-speech analysis—without any discussion of why petitioners' speech is commercial. Skipping past any threshold consideration of the nature of petitioners' speech, the panel announced that "[t]wo levels of constitutional scrutiny potentially apply to claims based on compelled *commercial* speech." Pet. App. 16a (emphasis added). "Typically," the panel continued, "we apply intermediate scrutiny," or, "when the compelled speech requires only the disclosure of purely factual and uncontroversial information, " the " lower standard applied in *Zauderer* "—a form of rational-basis review—"applies." *Ibid.* (citation

modified). It then wrongly concluded that "*Zauderer*[3] scrutiny applies." *Ibid.*

By assuming, without explaining, that this was a "commercial speech" case, the Ninth Circuit chose from two lesser levels of scrutiny than what the First Amendment ordinarily requires. Yet there is no reason to start from that position—*i.e.*, that petitioners, private nonprofits, can be compelled to speak the State's ideological message simply because petitioners will be operating on a state-granted license.

The error—one that will continue the *Zauderer* schism—is to say that because this Court (potentially)[4] recognizes some form of commercial-speech categories, it also permits compelled ideological speech from nonprofits who are not soliciting commercial transactions. But, as explained below, *Becerra* has foreclosed that notion.

b. Commercial speech is expression relating to the speaker's economic interests, particularly *marketing* efforts.

Until 1942, "commercial speech" was not a legal concept. But in *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942), this Court recognized it as a separate category and held that the First Amendment did not protect it. In 1976, the Court walked back that proclamation, though not entirely. See *Va. State Bd. of Pharmacy* v. *Va. Citiz. Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). ("[W]e of course do not hold that it can never be regulated in any way.").

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[3] The Court also erred in its *Zauderer* analysis, even assuming that it did apply. That's discussed *infra* § II.

[4] See *supra* n.2

The framework for identifying commercial speech came later, when the Court set forth a four-part intermediate scrutiny test for constitutionality. A speech regulation is permissible under the *Central Hudson* test when (i) the regulation restricts speech that concerns lawful activity, (ii) the regulation's asserted interest is substantial, (iii) the regulation directly advances that interest, and (iv) the regulation is no more extensive than necessary to serve that interest. *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

This line of cases led to *Zauderer*, which allowed compelled disclosures that are "purely factual and uncontroversial," when a commercial actor is advertising. *Zauderer*, 471 U.S. at 651; see also Pet. App. 16a (the Ninth Circuit relied on this language as a stepping stone). Cases applying *Zauderer* involve speakers engaging in profit-seeking business activities through proactive speech. That limited set of cases has been subject to lesser First Amendment protections.

Central to *Zauderer*'s holding was the condition that the principle be confined to "commercial advertising":

> The State has attempted only to prescribe what shall be orthodox in *commercial advertising*, and its prescription has taken the form of a requirement that appellant include in his *advertising purely factual and uncontroversial information* about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, *appellant's*

> *constitutionally protected interest in not providing any particular factual information in his advertising is minimal. . . .* But we hold that an *advertiser's* rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.

Zauderer, 471 U.S. at 651 (citing *Va. Pharmacy Bd.*, 425 U.S. 748 (emphases added)).

The Court pointed out that caselaw leading up to *Zauderer* recognized the advertising category as unique: "Thus, in virtually all our commercial speech decisions to date, we have emphasized that because *disclosure requirements* trench much more narrowly *on an advertiser's interests* than do flat prohibitions on speech, warnings or disclaimers might be appropriately required... in order to dissipate the possibility of consumer confusion." *Zauderer*, 471 U.S. at 652 (citation modified & emphasis added). *Zauderer* is thus limited to disclosures about the advertiser's own goods or services once he decides to market them through speech soliciting customers. It does not extend to compelling ideological statements for actors not engaged in such "commercial speech."

And here, petitioners were not proposing commercial transactions when California insisted on inserting the Compelled Notice into their speech. They were religious ministries seeking to obtain a license to provide church-based childcare. No First Amendment case permits California to compel daycare facilities (let alone religious ministries) to speak apart from their own advertising—and the Compelled Notice has nothing to do with petitioners' advertising. This Court has rejected the Ninth

Circuit's expansion of *Zauderer* in this way. *Becerra*, 585 U.S. at 768.

c. This case should be governed by *Becerra* and, therefore, strict scrutiny.

There's no dispute that the "notice is a content-based regulation of speech." *Becerra*, 585 U.S. at 766; see also Pet. App. 15a (noting "the required posting of government-drafted notices *can* raise First Amendment issues" and petitioners "do[] not want to communicate" the message the Compelled Notice requires) (emphasis in original)). As in *Becerra,* petitioners "must provide a government-drafted script about the availability" and provision of alternative services, predicated on the idea of third-party rights to information. *Ibid.* In *Becerra,* the government script concerned abortion—the "very practice that petitioners are devoted to opposing," *ibid.*, and here the Compelled Notice relates to a "practice" petitioners are "devoted to opposing": promoting alternative religions. The Compelled Notice thus " 'alters the content' of [petitioners'] speech"—and does so in an ideological way. *Ibid.*

Just as it did in *Becerra*, the Ninth Circuit below deviated from First Amendment principles because it misidentified the speech at issue. This Court's correction of that error in *Becerra* is instructive. As the *Becerra* majority explained, *Zauderer* noted "that the disclosure requirement governed only 'commercial advertising' and required the disclosure of 'purely factual and uncontroversial information about the terms under which . . . services will be available.' " *Becerra*, 585 U.S. at 768. And such requirements should be upheld unless they are 'unjustified or unduly burdensome.' " *Ibid.* Chief among the reasons that "[t]he *Zauderer* standard [did] not apply" in

Becerra was that the government's notice didn't "relate[] to the services that licensed clinics provide." *Id.* at 769. Far from advertising abortion services, the clinics in *Becerra* sought to "dissuade women from choosing that option." *Id.* at 765. The same disconnect exists here.

Likewise, petitioners do not want to offer polylithic religious services; they seek to operate *Christian* daycare services. Posting onsite notices touting other religions therefore triggers strict scrutiny, not *Zauderer,* for the same reasons the licensed notice in *Becerra* did. See *Becerra*, 585 U.S. at 771.

II. Even if *Zauderer* controlled, the Ninth Circuit misapplied it because the Compelled Notice is neither "uncontroversial" nor "purely factual."

The Ninth Circuit also misapplied *Zauderer*. *Zauderer* is reserved for compelled commercial speech involving "purely factual and uncontroversial information." 471 U.S. at 651. California's Compelled Notice is neither uncontroversial nor purely factual—in fact it is *misleading*.

a. The Notice is controversial.

The Compelled Notice touches on the inherently controversial issue of religious autonomy—regardless of whether "it takes sides in a heated political controversy." Pet. App. 17a (citation modified). Pointing people away from their faith is controversial to petitioners as ministries. Nor does the reasoning hold that the Compelled Notice doesn't force the church "to convey a message fundamentally at odds with its mission." *Ibid.* That's doubtful: petitioner churches surely have a mission to teach *their own* faith. The panel's analysis thus ignores that the

Compelled Notice forces petitioners to communicate a message fundamentally at odds with their religious beliefs. And it does so by countermanding the religious institutional authority to define religious participation for its own members on its own property.

More specifically, the Compelled Notice directly promotes alternative religions by stating that each child at the preschool is "free to attend religious services or activities of his/her choice and to have visits from the spiritual advisor of his/her choice," and that "[a]ttendance at religious services in or outside the center, shall be voluntary." Pet. App. 31a. Central to petitioners' religious belief and mission is the *opposite message*. The "spiritual advisor" element of the Notice is government-policy advocacy, and injecting outside spiritual authorities into the church-run school, directly contravening petitioners' convictions, is contestable.

It is also controversial to the parents who have selected a Christian preschool, and who may become concerned and confused upon seeing the Compelled Notice. Take a family who desires a Christian upbringing for their children and sees the Compelled Notice on Foothills's campus. The family is left thinking that either a) Foothills believes differently than they do, or b) their children risk being exposed to religious ideas to which the family does not subscribe. That family's conflict could quickly grow into a community crisis as word spread that Foothills Christian Ministries is not exactly Christian.

This controversy is not abstract. By compelling the church to notify parents that they are entitled to select a "spiritual advisor" contrary to the church's doctrine, California enlists the church to speak a message in tension with the church's religious views.

The Compelled Notice comes as an affirmative communication about rights against the church that undermine its mission. As such, it is controversial.

b. The Notice is not purely factual.

The Compelled Notice is not factual. The Ninth Circuit incorrectly claims that the Notice provides "literally true" information. Pet. App. 16a. But the Notice cannot be true when California has disavowed enforcement. Since the State will not compel provision of outside spiritual advisors and alternative religious services, the Compelled Notice conveys a misleading advertisement of a right that doesn't exist. It is false.

Mischaracterizing the Notice as "literally true," the Ninth Circuit recasts the Notice to say something factual about parents' rights generally. *Ibid.* Of course, parents retain the legal right to withdraw their children if they decide their children's needs are better met elsewhere. But that is not what the Notice says. Rather, it announces the right of children to consult outside religious advisors and services. Even California is unprepared to enforce this right to religious pluralism in the context of Christian schools. Accordingly, the Notice is not factual.

III. Even if *Zauderer* applied and the Compelled Notice were purely factual and uncontroversial, it still fails *Zauderer* as "unjustified or unduly burdensome."

Even if this Court determines that *Zauderer* applies and the information is uncontroversial and purely factual, the Notice remains impermissible because it is "unjustified" and "unduly burdensome." *Zauderer*, 471 U.S. at 651. Compelled commercial notices are

constitutional only if they (1) are reasonably related to a legitimate state interest, (2) address a real—not speculative—harm, and (3) are no broader or more burdensome than necessary. *Id.* at 652. The State bears the burden of proving each element. *Becerra*, 585 U.S. at 776.

If the Notice relates to the State's interest, it remains unjustified because California cannot identify a non-speculative harm it seeks to address. California's purported interest is protecting children's rights, Pet. App. 18a., yet nothing suggests parental confusion about those rights or that children's rights are being violated. Nevertheless, California co-opts private speakers to publicize rights in a way that is *more* confusing than had they remained silent. In this way, the Compelled Notice is even worse than the speech mandates in *Becerra*. The Notice burdens private speech with *inaccurate* information and is therefore unjustified.

Even if there were legitimate public confusion about the statute, the problem is purely hypothetical. The State concedes that childcare facilities can choose their religious practices when the parents of prospective students are aware. Pet. App. 15a. Because petitioners inform parents of religious mandates associated with their childcare and education, Pet. App. 16a ("parents of children enrolled in Foothills' facility have agreed that their children will attend Foothills' religious services"), children's rights never could have been violated under this agreement. Forcing petitioners' speech is an unjustified remedial measure to a hypothetical problem.

Additionally, the Notice is broader and more burdensome than necessary to address the State's

interest. It forces parochial schools to make statements inconsistent with their religious beliefs as a condition of licensure. This drastic change in the petitioners' speech is unnecessary, when the State could remedy any confusion over children's rights by its own marketing campaigns or by other, more limited disclosures.

The Notice is also unduly burdensome because it doesn't redress any potential violations of children's rights. Even if the Notice effectively informed parents about rights being denied, the State declines to enforce the rights anyway. Pet. App. 8a. So the burden on parochial schools to post speech inconsistent with their beliefs is overly broad. And the overbreadth is significant because petitioners are no longer able to consistently promote their religious ideals—and must then communicate *other* messages to remedy the confusion the Notice will inevitably cause.

Finally, even if the Notice were not substantively burdensome, it is facially burdensome because its contents are duplicative, requiring childcare facilities to hand out written notices to parents *and* post notices in publicly visible areas. Cal. Health & Safety Code § 123472; 22 C.C.R. § 101223(a)(5). The State thus requires two instances of compelled speech without showing that one would be insufficient. In *Becerra*, California required pregnancy centers to post the information in one of several permissible ways, but that requirement was still unduly burdensome. 585 U.S. at 768. Here, California demands distribution of the Notice in multiple manners, making the burden placed on petitioners' speech even greater than the burden in *Becerra* and certainly greater than necessary to advance the State's interest.

Ultimately, the State compels speech from childcare facilities to address a problem that does not exist. This extends beyond the theoretical chilling of speech, creating an undue burden that is inconsistent with the First Amendment.

IV. The panel's attempted distinction of *Becerra* misunderstands this Court's decision in that case.

The compelled disclosure in *Becerra* is virtually the same as the Compelled Notice here, compelling faith-based organizations to display messaging contrary to their religious values. The Ninth Circuit's attempted distinction misunderstands this Court's reasoning in *Becerra*. The panel below explained as the dispositive distinction that "the law at issue in [*Becerra*] did not merely require the disclosure of statutory rights." Pet. App. 17a. But that is exactly what California was doing in *Becerra*: requiring disclosure of statutory rights. 585 U.S. at 773.

This Court explained in *Becerra* why disclosure of statutory rights is not a free pass to compel speech. California argued that the information was factual and designed to ensure that pregnant women were aware of state-sponsored services. *Id.* at 755. The Court rejected the compelled speech—even spotting California intermediate scrutiny—because it was not narrowly drawn. *Id.* at 773. California's purpose to "make sure that state residents know their rights and what [ ] services are available to them" did not justify a notice was content-based, speaker-based, underinclusive, not tied to any specific conduct, and unduly burdensome. *Id.* at 755–58. California is trying it again here, but "California cannot co-opt the licensed facilities to deliver its message for it." *Id. a*t 775.

The Ninth Circuit attempted to distinguish the regulation struck down in *Becerra* from the regulation here on two additional grounds. First, the Ninth Circuit reasoned that the Compelled Notice, unlike *Becerra*, is tied to a substantial state interest—namely, "protecting children in day care facilities." Pet. App. 18a. But this Court assumed for the purpose of its analysis in *Becerra* that the State's asserted interest in ensuring that low-income women have information was a substantial interest, and struck down the compelled notice regardless. *Becerra*, 585 U.S. at 773. So, the panel's distinction fails here too.

The Ninth Circuit also reasoned that the Compelled Notice, unlike the regulation in *Becerra*, did not "threaten to drown out" the preschools' message because it is "minimal." Pet. App. 18a. Again, this imagines a nonexistent distinction. The compelled notice in *Becerra* did not prevent pregnancy centers from communicating their preferred messaging—an argument that California made in defending the compelled speech—and this Court still concluded that the notice placed an undue burden on the centers by skewing the message seen by onsite visitors. *Becerra*, 585 U.S. at 757. Here too, the notice is ripe to confuse parents who would have enrolled their children in petitioners' preschools but now doubt the authenticity and sincerity of petitioners' beliefs and instruction.

The basis for this Court's holding in *Becerra* applies here: the regulation does not fall into either of the two categories that may support mandatory disclosures—"health and safety warnings" and "purely factual and uncontroversial disclosures about commercial products." *Becerra*, 585 U.S. at 775. In addition, "California has not demonstrated any justification for the [ ] notice that is more than purely hypothetical,"

and even if it had, the compelled notice unduly burdens protected speech by imposing a "government-scripted, speaker-based disclosure requirement that is wholly disconnected from the State's informational interest." *Id* at 758. This precisely describes the Compelled Notice—although here it is even stranger because California has disavowed any intention to enforce the statutory right, making the message outright false. Pet. App. 8a.

One final commonality: Justice Kennedy's concurrence in *Becerra* highlights how "viewpoint discrimination is inherent" in the law and poses a "serious threat" "when the government seeks to impose its own message in the place of individual speech, thought, and expression." *Becerra*, 585 U.S. at 779. That too is a concern with California's forcing religious preschools to advertise alternative religions.

V. The Compelled Notice fails narrow tailoring for the same reasons the licensed notice in *Becerra* was unconstitutional.

Because *Zauderer* does not apply here, strict scrutiny does. Compelling speech is inherently content-based because absent compulsion, the speaker would have conveyed a different message—or none at all. *Becerra*, 585 U.S. at 766. And "content-based regulations of speech are subject to strict scrutiny." *Id.* at 767. So, California must prove that the Compelled Notice furthers a compelling interest and is narrowly tailored to achieve it. *Reed* v. *Town of Gilbert, Ariz.,* 576 U.S. 155, 171 (2015).

Even assuming the State has a compelling interest in protecting the rights of children at some level of

generality, the Compelled Notice is not narrowly tailored. It fails for the same reasons this Court rejected the notice in *Becerra*—and for the same reasons it would be unjustified and unduly burdensome under *Zauderer*.

In *Becerra*, this Court held the challenged regulation was unconstitutional because it was not narrowly tailored to serve a compelling government interest. 585 U.S. at 773. The analysis is no different here. California had numerous less restrictive means available to advance its asserted interest " without burdening a speaker with unwanted speech." *Id.* at 776 (citation modified). California could have instituted public-information campaigns to inform parents of their children's rights. See *id.* at 775. Or it could have posted information on public property outside of childcare facilities, much like it could have posted "information on public property near crisis pregnancy centers." *Ibid.* Those options avoid compelling private speech.

And because the Compelled Notice is underinclusive for the purpose it intends to achieve, it "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Id.* at 774 (citation modified).

These doubts deepen in light of the regulation's unexplained exemptions. Just as the regulation in *Becerra* excluded federal clinics and family-planning providers for low-income residents, *id.* at 774, the regulation here exempts organizations like the YMCA and the Boy Scouts, Cal. Health & Safety Code § 1596.793. The State provides no justification for why these exemptions do not undermine its asserted purpose—or why exempting secular groups while

demanding compliance from religious groups is permissible. These discrepancies further call into question whether California seeks to pursue the interest it invokes.

California also ignored several less restrictive means of accomplishing the same governmental interest. First, California offers no evidence suggesting that the creation and implementation of training materials for childcare professionals would be insufficient to protect the rights of children at issue. Second, the Compelled Notice is facially duplicative, requiring publication by both disseminating paper handouts and posting signs. 22 C.C.R. § 101223(b)(1)–(2). California does not argue that either one of these requirements would be insufficient on its own—although it did submit a letter to the Ninth Circuit three days before oral argument attaching a new form without the "spiritual advisor" language. Pet. Br. 9–10. Whether that policy modification is valid or not, the regulation burdens more speech than necessary.

Last, this Compelled Notice is not narrowly tailored because it communicates something that is false. Pet. App. 8a ("And far from communicating a specific warning or threat of enforcement, the State has explicitly disavowed enforcement of the provision under these circumstances"). The State's disavowal undercuts the asserted State's interest—if the provision does not warrant enforcement, compelling private parties to display a notice suggesting otherwise cannot be narrowly tailored.

Accordingly, the Compelled Notice fails narrow tailoring by burdening substantially more speech than necessary to advance the asserted State interest. The result is a regulatory scheme that is both

overinclusive and underinclusive, and therefore not narrowly tailored. See *Becerra*, 585 U.S. at 774–75; see also *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (when the State can publish the same information, a regulation requiring that disclosure is not narrowly tailored). Like the licensed notice in *Becerra*, it fails strict scrutiny and is unconstitutional.

VI. Other precedent likewise precludes the Ninth Circuit's expansive view of "commercial speech."

Cases besides *Becerra* require the same conclusion: the Ninth Circuit incorrectly accepted a view of "commercial" or "professional" speech this Court has rejected.

Take *Sorrell*, where this Court struck down Vermont's law restricting the sale and disclosure of pharmaceutical records for marketing purposes. *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 557 (2011) The constitutional problem? The regulation disfavored certain speakers while allowing others restriction-free access to the same information. *Sorrell*, 564 U.S. at 563–64. It was also content based because it prohibited use of regulated information for marketing, but not other purposes. *Ibid.* As a result, the law regulated speech, and the "commercial" context did not matter.

The same is true here, where the Compelled Notice imposes content-based and speaker-based restrictions. Simply put, "the creation and dissemination of information are speech [under] the First Amendment," including when the speakers happen to be corporate entities. *Id.* at 570.

This Court rejected a similar attempt to regulate the speech of licensed professionals in *Riley*. 487 U.S. at 794. There, the forced disclosure required licensed fundraisers to tell each potential donor the amount the fundraiser disbursed to charities in the past year. *Id.* at 784. Unpersuaded by the state's argument that it was regulating economic conduct, the Court noted that "the restriction is undoubtedly one on speech" because it impacts the dissemination of information and harms the charities' message. *Id.* at 790 ("this regulation burdens speech and must be considered accordingly") (applying strict scrutiny); see also *Becerra*, 585 U.S. at 770 (applying strict scrutiny and noting that the compelled disclosure in *Riley* was "nearly identical").

This Court also explained that commercial speech, when combined with fully protected informative or persuasive speech, does not retain its commercial character. *Riley*, 487 U.S. at 796. Rather, the level of scrutiny depends on the nature of the speech as a whole; attempting to parcel out speech and apply different tests to different segments of it would be an "artificial and impractical" exercise. *Ibid*. So too here. Even if petitioners' speech were commercial, it is neither conduct nor incidental to conduct, and its integration with fully protected religious expression should require strict scrutiny.

Sorell and *Riley* undergird *Becerra* and warrant the same result: California cannot use licensure as a hook for regulating speech. Operating in a commercial marketplace or holding a state license does not waive one's speech rights. Nor does earning a living diminish constitutional protection for religious messages; and permitting California to compel speech inconsistent with that message would infringe those

rights. This Court has long recognized that persuasive and informative speech retains its First Amendment protections even when intertwined with commercial speech or conduct. *Riley*, 487 U.S. at 796. Here, the message itself is neither necessary nor ancillary to conduct. And the Compelled Notice doesn't regulate conduct—only speech.

The constitutional violation is especially stark because the Compelled Notice contradicts religious views; it's antithetical to core First Amendment guarantees, which assure that the government shall not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 642 (1943). Yet, as in *Becerra*, California seeks to "force persons to express a message contrary to their deepest convictions," striking at the heart of the First Amendment. 585 U.S. at 780.

Addressing the licensure issue directly, this Court has rejected the idea that states could possess "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Id.* at 773. Allowing states to choose the level of First Amendment protection accorded to speech in this way would give them "a powerful tool to impose invidious discrimination of disfavored subjects." *Ibid*. (citation modified).

This Court's reasoning in *Becerra* thus highlights the danger of allowing the state to impose content-based restrictions on professional speech. Since the state itself decides which professionals need a license to operate, excepting professional speech from full First Amendment protection would give states the

tacit power to single out disfavored groups and effectively censor or dilute the content of their speech under the guise of other justifications (*e.g.*, health, safety, credentialing). This Court has never sanctioned that sort of police power. And California's use of the licensure requirement to force parochial preschools to broadcast its government script flouts a long line of cases to the contrary.

* * *

CONCLUSION

The Court should grant the petition and summarily reverse the Ninth Circuit's decision.

Respectfully submitted,

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